BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA DEL ROSARIO ORTIZ	)	
Claimant	)	
VS.	)	
	)	
S2 HOLDINGS, INC., d/b/a	)	
THE CLEANING AUTHORITY	)	Docket No. 1,060,227
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the December 12, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. C. Albert Herdoiza and Thomas R. Fields of Kansas City, Kansas, appeared for claimant. Anemarie D. Mura of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and is listed in the December 12, 2012, Order. For clarification regarding the preliminary hearing held on December 6, 2012, the record includes the transcript of the December 6, 2012, preliminary hearing and exhibits thereto. The record also includes all pleadings contained in the administrative file.

ISSUES

Respondent denied claimant's December 7, 2011, accident arose out of and in the course of her employment as claimant was on her way to assume her duties of employment with respondent when the accident occurred. Respondent asserted the accident occurred in a public parking lot that it neither owned nor exclusively controlled. Consequently, under K.S.A. 2011 Supp. 44-508(f)(3)(B), claimant's accident did not arise out of and in the course of her employment.

The ALJ determined claimant's accident did not arise out of and in the course of her employment with respondent. Specifically, the ALJ found that claimant was on her way to assume her work duties with respondent, and the parking lot where she was injured was not owned or under the exclusive control of respondent.

Claimant appeals and argued that she was required by respondent to park in a designated area. Claimant testified that all employees, including herself, parked in the designated area every day. On December 7, 2011, claimant had parked in the designated area and was walking to respondent's office when she stepped off a curb and was struck by a vehicle. Claimant argued in her brief that she was already at work when the accident occurred and, therefore, the coming and going exception did not apply.

The only issue is: Did claimant's personal injury by accident on December 7, 2011, arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The ALJ's Order sets out findings of fact that are detailed and accurate. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings of fact as its own as if specifically set forth herein except as hereinafter noted.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[2]

K.S.A. 2011 Supp. 44-508(f)(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume

[1] K.S.A. 2011 Supp. 44-501b(c).

[2] K.S.A. 2011 Supp. 44-508(h).

> the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Claimant testified the parking lot where she parked her automobile contained hundreds of spaces and was open to the general public. Claimant testified she and other employees of respondent were only allowed to park in a central parking lot that was available for parking to the employees of other businesses and the general public. However, that was disputed by respondent's witnesses, who testified respondent's employees were free to park anywhere in the public parking lot, but were asked to refrain from parking in front of respondent's office or in the parking spaces in front of other businesses. When claimant was struck by a car and injured, she was on her way to assume her duties of employment. Therefore, pursuant to K.S.A. 2011 Supp. 44-508(f)(3)(B), claimant's injuries did not arise out of and in the course of her employment.

However, K.S.A. 2011 Supp. 44-508(f)(3)(B) also contains several exceptions to the rule that "arising out of and in the course of employment" shall not be construed to include injuries to the employee occurring while the employee was on the way to assume the duties of employment or after leaving such duties. The first exception is that where a worker is on the way to assume the duties and sustains an injury due to the employer's negligence, the injury is compensable. Here, there was insufficient evidence that respondent was negligent. The negligent party was the individual driving the vehicle that struck claimant. Consequently, this Board Member finds the aforementioned exception is not applicable.

A second exception in K.S.A. 2011 Supp. 44-508(f)(3)(B) provides that an employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer. This exception is also inapplicable. Respondent did not own the parking lot where claimant was injured. There was insufficient evidence to show respondent had exclusive control over the parking lot where claimant parked her vehicle or that part of the parking lot where claimant was walking when she was struck and injured. In fact, respondent did not maintain the parking lot.

K.S.A. 2011 Supp. 44-508(f)(3)(B) provides a third exception that an employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the employee is on the only available route to or from work that involves a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by

the public except in dealings with the employer. This exception also does not apply, as claimant could take any route she wanted to respondent's place of business. Guadalupe Moralez, a co-worker of claimant, testified that respondent's employees took several routes from where they parked to respondent's office. Claimant did not have to drive her own vehicle to work if she did not wish to do so. The route claimant took to respondent's office imposed no greater risk or hazard than to which the general public was exposed.

When claimant was injured, she was not a provider of emergency services responding to an emergency. Therefore, that exception also does not apply.

Claimant cited *Thompson*[3] and argued that she was already at work when the accident occurred and the going and coming rule does not apply. Since *Thompson*, the Kansas Legislature has amended the Kansas Workers Compensation Act to include the language contained in K.S.A. 2011 Supp. 44-508(f)(3)(B). *Thompson* actually bolsters respondent's position and supports the decision of the ALJ that claimant's accident did not arise out of and in the course of her employment with respondent. In *Thompson*, respondent furnished parking in a public parking garage for claimant to park her motor vehicle. Claimant was not on her employer's premises at the time of her injury. Neither the parking garage where claimant parked, nor the area where claimant fell (hallway outside the elevator at the office building where she worked) was part of her employer's premises. Therefore, the going and coming rule exclusion applied to bar claimant's injuries from being compensable.

The Board has consistently held the term "arising out of and in the course of employment" as used in the Kansas Workers Compensation Act shall not be construed to include injuries an employee sustains while on the way from a public parking lot to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.[4] Simply put, claimant's accident did not arise out of and in the course of her employment as she was on her way from a public parking lot to assume her duties of employment with respondent and none of the exceptions contained in K.S.A. 2011 Supp. 44-508(f)(3)(B) are applicable.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[3] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[4] *Koch-John v. Nations Lending Service*, No. 1,021,226, 2005 WL 1365185 (Kan. WCAB May 31, 2005); *Fortner v. Shawnee County*, No. 262,470, 2001 WL 641625 (Kan. WCAB May 30, 2001); *Gramling v. American Bar-B-Que & Grill, Inc.*, No. 206,257, 1996 WL 548098 (Kan. WCAB Aug. 19, 1996); *Franson v. Landis & Gyr Powers*, No. 199,630, 1995 WL 712391 (Kan. WCAB Oct. 2, 1995).

[5] K.S.A. 2011 Supp. 44-534a.

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member affirms the December 12, 2012, preliminary hearing Order entered by ALJ Belden.

IT IS SO ORDERED.

Dated this ____ day of March, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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[6] K.S.A. 2011 Supp. 44-555c(k).